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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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STATE OF TEXAS,
Petitioner

v.

DANIEL GARCIA,
Respondent

State's Appeal from Appeal No. 03-19-00375-CR

Cause No. 78676 in the 426th District Court of Bell County

RESPONDENT'S BRIEF

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES Daniel Garcia, Respondent, by and through undersigned counsel, and submits this brief responding to the State's Brief on the Merits ("State's Br."), pursuant to Rule 70.2 of the Texas Rules of Appellate Procedure.

Argument and Authorities

Regarding the State's First Issue: *Is an objection required to preserve a challenge to restitution ordered payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam?*

(a) State's argument

The State argues that because Garcia did not object in the district court when the court stated at sentencing "I'll also order that you pay $1,000 to the office of the attorney general as restitution in this case," 10 RR 35, Garcia failed to preserve error:

> Appellant did not object to the in-court assessment of the restitution when the judge asked if there was any reason why the sentence should not be imposed. . . . Appellant's claim cannot be construed as a sufficiency challenge.

State's Br. 5.

(b) Respondent's reply

The State acknowledges that a complaint regarding the factual basis for the assessment of restitution can be made for the first time on appeal, citing *Idowu v. State,* 73 S.W.3d 918, 921 (Tex. Crim App. 2002). State's Br. 5. And that is precisely what Garcia argued in his brief to the Third Court of Appeals:

> A challenge to the factual basis for a restitution order may be raised for the first time on appeal. *Idowu v. State,* 73 S.W.3d 918, 922 (Tex. Crim. App. 2002).

Appellant's Br. 4.

Additionally, the written judgment containing the restitution order was issued after Garcia was sentenced. Garcia was sentenced April 30, 2019. 10 RR 1. The written judgment was not filed until May 8, 2019. CR 44-45. *Burt v. State,* 396 S.W.3d 574 (Tex. Crim. App. 2013) is instructive at this point. The appellant therein was informed by the trial judge at the punishment phase that restitution to the victims would be ordered and the appellant did not object. *Burt v. State,* 2011 Tex. App. LEXIS 5868, at 26-29 (Tex.App.—Dallas 2011), *rev'd, Burt,* 396 S.W.3d at 575.

The Dallas Court of Appeals held that the appellant had failed to preserve error. *Burt,* 2011 Tex. App. LEXIS 5868, at 28. The Court of Criminal Appeals reversed, noting that because at the time the trial court orally stated that it was going to order restitution, the written judgment did not exist:

> [T]he court of appeals suggested three ways that appellant could have preserved the restitution issues: by objecting to the imposition of restitution (presumably at the sentencing hearing); by including the issues in the motion for new trial; or by amending his motion for new trial to include the restitution issues. *Id.* But the court of appeals's analysis ignores the fact that it was impossible for appellant to raise the restitution issues in any of these forums, since the written judgment containing the restitution order was issued *after* each of these supposed opportunities. . . . These issues arose when restitution was ordered in the written judgment. Although each of the three forums suggested by the court of appeals for preservation was available to appellant, they were available to him only before the written judgment issued and therefore could not have been used to challenge a judgment that did not yet exist.

Burt, 396 S.W.3d at 578.

Garcia's written judgment, which included an order of restitution in the amount of $1,000 to "the office of the Attorney General," was not filed until eight days after Garcia was sentenced. Garcia could not have challenged at sentencing a written judgment that did not yet exist.

Furthermore, the case relied upon by the State, *Idowu*, involved a different sentencing context than Garcia's. The appellant therein was initially placed on probation, at which time the trial court assessed restitution the amount of $14,522.45 as a condition of his probation. *Idowu*, 73 S.W.3d at 920. The appellant did not object at that time. *Id.* The appellant subsequently filed a motion for new trial, alleging ineffective assistance of counsel by failing to subpoena certain witnesses regarding the amount of restitution assessed. The intermediate court of appeals held that the appellant had failed to preserve error, and the Court of Criminal Appeals agreed. In so doing, the Court noted the difference between restitution assessed as a condition of probation and restitution ordered when probation was not involved:

> We ordinarily allow defendants to raise sufficiency of the evidence questions for the first time on appeal. Whether the record provides a sufficient factual basis for a particular restitution order could be considered an evidentiary sufficiency question that need not be preserved by objection at the trial level. In *Speth v. State,* however, we determined that the imposition of probation conditions, specifically a requirement that a defendant refrain from certain activities, is not appropriate for a sufficiency review.

Idowu, 73 S.W.3d at 922. Twelve years later, the Court of Criminal

Appeals again noted the distinction between error preservation in the context of probation and error preservation otherwise:

> Ordinarily, to preserve an issue for appellate review, an appellant must have first raised the issue in the trial court. However, it is also ordinarily true that a claim regarding sufficiency of the evidence need not be preserved for review at the trial level. But, [internal quotation marks omitted] imposition of a sentence is profoundly different from the granting of community supervision. Concepts of error-preservation that apply in non-probation cases do not necessarily carry over to probation cases because probation involves a kind of contractual relationship that does not exist in non-probation cases.

Gutierrez-Rodriguez v. State, 444 S.W.3d 21, 23 (Tex. Crim. App. 2014).

Regarding the State's Second Issue: *Alternatively, does a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam qualify as victim compensation?*

(a) State's argument

The State's argument is that because the child victim received a benefit in the form of the SANE examination, the cost of which was paid from victim-compensation funds managed by the Attorney General (and

therefore paid "on behalf of a victim"), Garcia should be required to reimburse the Attorney General because the Attorney General is a *de jure* victim:

> Appellant sexually assaulted the child-victim, the victim received the benefit of a forensic medical exam for possible use in the investigation and prosecution of Appellant, and the cost of the exam was assumed by the State with victim-compensation funds managed by the Attorney General. The Attorney General was therefore entitled to restitution for money paid on behalf of the victim.

State's Br. 3.

> [T]he Legislature designated the Attorney General as a *de jure* victim when it covers the cost of a forensic medical exam for a sexual assault victim.

State's Br. 6.

(b) Respondent's reply

For starters, the following facts are not in dispute: (1) Neither the alleged victim (J.J.) nor her family paid a dime for the SANE examination that is the subject of this case, and (2) the district court ordered Garcia to pay $1,000 to the office of the attorney general as restitution based on the fact that the attorney had reimbursed the Bell County District Attorney's Office for the SANE examination. 10 RR 35; PSI.

(i) The restitution statute

Article 42.037 of the Code of Criminal Procedure was entitled "Restitution."[1] If the offense at issue resulted in personal injury to a victim,

> the court may order the defendant to make restitution to:
>
> (A) the victim for any expenses incurred by the victim as a result of the offense; or
>
> (B) the compensation to the victims of crime fund to the extent that fund has paid compensation to or on behalf of the victim.

Tex. Crim. Proc. Code Ann. art. 42.037(b)(2). It is worth noting at this point what the legislature had in mind in enacting this part of the restitution statute:

> Under the Crime Victims' Compensation Act, the Office of the Attorney General (OAG) administers the Crime Victims' Compensation (CVC) Fund, which awards compensation to victims of crimes or families of victims *who have sustained monetary losses as a result of personal injuries or deaths.* Money in the fund comes primarily from court costs and fees imposed on criminal offenders. (Emphasis added.)
> . . .
> [House Bill] 1751 would amend CCP, art. 42.037 to require those convicted of crimes to pay restitution to the victims, rather than leaving it to the discretion of the court. The bill also would require the offender to reimburse the CVC fund *for*

[1] The statute has since been amended. Acts 2019, 86th Leg., ch. 469, § 2.14, effective January 1, 2021.

> *money paid to the victims* from the fund for damages resulting from the offense.[] (Emphasis added.)

House Research Organization, Bill Analysis, Tex. H.B. 1751, 79th Leg., R.S. (2005).

What is significant for purposes of the instant case is that the legislature only intended restitution be ordered to reimburse the crime victims compensation fund *if the victim suffered a monetary loss* – which didn't happen in this case. We move on.

In determining whether to order restitution, the court shall consider:

> the amount of the loss sustained by the victim and the amount paid to or on behalf of the victim by the compensation to victims of crime fund as a result of the offense[.]

Tex. Crim. Proc. Code Ann. art. 42.037(c)(1). The procedure for making restitution to the victims of crime fund was set forth in Subchapter B of Chapter 56 of the Code of Criminal Procedure:

> [T]he court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offenses *or to the compensation to victims of crime fund established under Subchapter B, Chapter 56, to the extent that fund has paid compensation to or on behalf of the victim*.

Tex. Crim. Proc. Code Ann. art. 42.037(a). Given that Garcia was not ordered to pay restitution to J.J., Subchapter B[2] of Chapter 56 of the Code of Criminal Procedure as it existed at the time of Garcia's sentencing[3] determines whether or not Garcia should be required to reimburse the Attorney General. Subchapter B of Chapter 56 was entitled "Crime Victims Compensation Act" ("CVCA"). Tex. Crim. Proc. Code Ann. art. 56.31.

(ii) Crime Victims Compensation Act

So who could the attorney general pay from the compensation to victims of crime fund? The first criteria was pecuniary loss:

> The attorney general shall award compensation for *pecuniary loss* arising from criminally injurious conduct if the attorney general is satisfied by a preponderance of the evidence that the requirements of this subchapter are met.

Tex. Crim. Proc. Code Ann. art. 56.54(a). The second criteria was that generally, only claimants and victims could receive payment:

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[2] The State spends approximately twelves pages of its brief in reliance on *Subchapter A* of Chapter 56 of the Code, during which times it cites to at least 17 separate statutory provisions in *Subchapter A* and forty-two years of legislative history regarding *Subchapter A*. State's Br. 6-18.

[3] The Crime Victims Compensation Act has since been amended. Acts 2019, 86th Leg., ch. 469, effective January 1, 2021.

> Except as provided by Subsections (h), (i), (j), and (k) . . . the compensation to victims of crime fund may be used only by the attorney general for the payment of compensation to *claimants* or *victims* under this subchapter.

Tex. Crim. Proc. Code Ann. art. 56.54(b). Subsections (h), (i), and (j) are not relevant. Subsection (k) is relevant:

> The attorney general may use the compensation to victims of crime fund to:
>
> (1) *reimburse a law enforcement agency for reasonable costs of a forensic examination that are incurred by the agency*[]; and
>
> (2) make a payment to or on behalf of an individual for the reasonable costs incurred for medical care provided[.]

Tex. Crim. Proc. Code Ann. art. 56.54(k).

Now for some definitions. The relevant definitions under the Crime Victims' Compensation Act were as follows:

- "Victim" means . . . an individual who . . . suffers personal injury or death as a result of criminally injurious conduct[.]

Tex. Crim. Proc. Code Ann. art. 56.32(a)(11)(A)(i).

- "Claimant" means, except as provided by Subsection (b), any of the following individuals who is entitled to file or has filed a claim for compensation under this subchapter:

  (A) an authorized individual acting on behalf of a victim;
  . . .

(C) a dependent of a victim who died as a result of criminally injurious conduct;

(D) an immediate family member or household member of a victim who (i) requires psychiatric care or counseling as a result of criminally injurious conduct; or (ii) as a result of the criminally injurious conduct, incurs with respect to a deceased victim expenses for traveling to and attending the victim's funeral or suffers wage loss from bereavement leave taken in connection with the death of that victim[.]

Tex. Crim. Proc. Code Ann. art. 56.32(a)(11)(A)(i).

- *"[C]laimant does not include a service provider*.

Tex. Crim. Proc. Code Ann. art. 56.32(b).

- "Pecuniary loss" means the amount of expense reasonable and necessarily incurred as a result of personal injury or death for: . . . medical, hospital, nursing, or psychiatric care or counseling, or physical therapy[.]

. . .

Tex. Crim. Proc. Code Ann. art. 56.32(a)(9).

- "Personal injury" means physical or mental harm.

Tex. Crim. Proc. Code Ann. art. 56.32(a)(10).

(iii) Neither J.J. nor the Attorney General were "victims" and there are no "claimants"

Was J.J., the victim alleged in the indictment, a "victim" for purposes of the CVCA? Answer: No. She suffered no pecuniary loss; nor

did she suffer personal injury or death as a result of criminally injurious conduct. The State may argue that J.J. suffered mental harm. Perhaps, but the issue in this case is reimbursement *vel non* for the SANE exam. The Attorney General did not suffer personal injury or death and thus is not a victim.

Were there any legitimate claimants? Answer: No. All the above-referenced definitions describe claimants as being individuals acting on behalf of the victim. But J.J. was not a victim and the Attorney General was not a victim. And a service provider cannot be a claimant. That leaves art. 56.54(k), which allows the attorney general to use funds from the victims of crime fund to reimburse a law enforcement agency for costs of a forensic examination. It would appear to have been proper, based on this statute, for the Attorney General's Office to reimburse the Bell County District Attorney's Office for the SANE examination. But that does mean that Garcia should be required to reimburse the Attorney General.

(iv) What about subrogation?

This is what the State argues:

> This is a classic subjugation[4][.]By assuming the cost, the State acted as a third-party facilitator-like a health insurance company-that assumed a specific financial responsibility for a service provided for the victim as a result of the offense. . . . If a victim's insurance company paid a claim for the exam or evidence collection on the victim's behalf, the victim's insurance company would have been entitled to restitution.

State's Br. 19-20.

Subrogation is defined thusly:

> Subrogation denotes the exchange of a third person who has paid a debt in the place of the creditor to whom he has paid it, so that he may exercise against the debtor all the rights which the creditor, if unpaid, might have done.

Black's Law Dictionary 1427 (6th ed. 1990). "Subrogation comes in three varieties: equitable, contractual, and statutory." *Tex. Health Ins. Risk Pool v. Sigmundik,* 315 S.W.3d 12 (Tex. 2010).

The relevant statute, article 56.51, entitled "Subrogation", provided:

> If compensation is awarded under this subchapter, the state is subrogated to all the *claimant's or victim's* rights to receive or recover benefits for *pecuniary loss* to the extent compensation is awarded from a collateral source.

[4] Respondent assumes the State means "subrogation."

Tex. Crim. Proc. Code Ann. art. 56.51. "Collateral source" is a statutorily defined term:

> "Collateral source" means any of the following sources of benefits or advantages for pecuniary loss that a claimant or victim has received or that is readily available to the claimant or victim[.]

Tex. Crim. Proc. Code Ann. art. 56.32(a)(3). The statute goes on to list nine sources that qualified as collateral sources. *Id.*

The State's argument fails based on the language of these statutes. First, as noted above, there are no legitimate claimants or victims. Therefore, the Attorney General has no rights to step into. Second, the Attorney General hasn't suffered a "pecuniary loss" because its payment to the Bell County District Attorney's Office was not payment based on anyone's "personal injury or death for medical, hospital, nursing, or psychiatric care or counseling, or physical therapy." See Tex. Crim. Proc. Code Ann. art. 56.32(a)(9).

Regarding the State's Third Issue: *Alternatively, is a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam a proper reimbursement cost?*

(a) State's argument

The State argues that Garcia has some sort of freestanding obligation to reimburse the Attorney General:

> This Court should uphold the order here because it reimbursed the State for an investigation expense and Appellant's prosecution, [citing *Allen v. State,* 614 S.W.3d 736, 745 (Tex. Crim. App. 2019)].

State's Br. 25.

(b) Respondent's reply

There are at least two problems with the State's argument. To begin with, *Allen* addressed the legitimacy of reimbursement-based court costs. *Allen,* 614 S.W.3d at 744. Garcia was assessed (and paid) $133.00 as a "Consolidated Court" fee. CR 47. At the time of his sentencing, 37.6338 percent of that fee was allocated to the compensation to victims of crime

account. Tex. Loc. Gov't Code Ann. § 133.102(e)(10).[5] Thus, Garcia has paid any statutorily required reimbursement.

Second, the State's argument, if extended, would require a defendant to reimburse the State for all expenses incurred in prosecuting him. Why stop at asking him to pay for the alleged victim's SANE exam? Why not require him to pay, for example, the expenses associated with travel and housing for an expert witness that the State needs to prosecute him? That would be an absurd result.

Prayer for Relief

For all the above reasons, Garcia prays that this Court affirm the Third Court's decision.

[5] Section 133 has since been amended. Acts 2019, 86th Leg., ch. 1352, § 1.03, effective January 1, 2020.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i) because the brief contains 3,080 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

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